

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DERRICK D. HALL,

Defendant-Appellant.

UNPUBLISHED

March 10, 2000

No. 213415

Wayne Circuit Court

LC No. 97-007524-FC

Before: Bandstra, P.J., and Holbrook, Jr. and Fitzgerald, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of three counts of first-degree criminal sexual conduct (“CSC I”), MCL 750.520b(1); MSA 28.788(2)(1). He was sentenced to three concurrent terms of twenty to forty years’ confinement. He appeals as of right. We affirm.

Defendant first argues that numerous instances of prosecutorial misconduct denied him a fair trial. Because defendant did not object at trial to the alleged misconduct, appellate review is precluded unless a curative instruction could not have eliminated any possible prejudice or failure to consider the issue would result in a miscarriage of justice. *People v Ramsdell*, 230 Mich App 386, 404; 585 NW2d 1 (1998). However, defendant also contends that counsel was ineffective for failing to object. Accordingly, we will address the merits of his claim. Issues of prosecutorial misconduct are decided on a case-by-case basis, with the reviewing court examining the pertinent portion of the record and evaluating the prosecutor’s remarks in context. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). The test is whether defendant was denied a fair and impartial trial. *Id.*

Our review of the record reveals that the challenged statements made by the prosecutor during closing and rebuttal arguments were either proper responses to defense counsel’s arguments or reasonable inferences from the evidence produced at trial. *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996); *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992). Although a prosecutor may not vouch for the credibility of a witness, a prosecutor may argue from the facts that a witness is credible or that the defendant or another witness is not worthy of belief. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). No misconduct appears in the record.

Defendant next argues that the trial court's instructions to the jury were improper because they failed to instruct the jury that it could return a "verdict" of "no verdict because of disagreement and inability to reach a unanimous verdict," and because the instructions shifted the burden of proof to defendant. We disagree. Defendant failed to raise this issue at trial. As a result, our review is limited to the question of whether relief is necessary to avoid manifest injustice. See *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993); *People v Ullah*, 216 Mich App 669, 676-677; 550 NW2d 568 (1996).

Criminal defendants are guaranteed a unanimous jury verdict under the state constitution. See Const 1963, art 1, § 14; *People v Cooks*, 446 Mich 503, 510-511; 521 NW2d 275 (1994). Consequently, trial courts are required to give proper instructions regarding the unanimity requirement. *Id.* at 511. An instruction relating to unanimity requires reversal only if it has an "undue tendency of coercion." *People v Pollick*, 448 Mich 376, 386; 531 NW2d 159 (1995).

The trial court's instructions did not deny defendant a fair trial. The trial court gave an instruction that was virtually identical to CJI2d 3.11. The Michigan Criminal Jury Instructions do not generally have the official sanction of the Michigan Supreme Court, *People v Petrella*, 424 Mich 221, 277; 380 NW2d 11 (1985). However, our Supreme Court has specifically directed the use of CJI2d 3.11. *Pollick*, *supra* at 386. Further, the trial court properly instructed the jury that their decision must be their own personal choice. The jury was never told that it was their "duty" or that they *must* reach a unanimous verdict. We reject defendant's claim that the trial court's instructions shifted the burden of proof to defendant. The trial court instructed the jury that the prosecution has the burden of proof on each and every element of the crimes charged, that "the defendant is not required to prove his innocence or do anything," and that "the prosecutor must prove each element beyond a reasonable doubt." The trial court's instructions were proper.

Defendant's contention that counsel was ineffective for failing to object to the prosecutor's alleged misconduct and the trial court instructions is without merit because, as noted above, the prosecutor's statements and the trial court's instructions were not improper. Counsel is not required to make frivolous or meritless objections. See *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991).

Defendant next claims that he is entitled to a new trial because the court reporter failed to transcribe a 911 police tape. Contrary to defendant's claim, the transcription is part of the record. In particular, the prosecution played the tape during its cross-examination of Lynette Fikes. As such, defendant's claim that he was prejudiced because the tape was not transcribed is without merit. Further, contrary to defendant's suggestions, there is nothing on the tape that "completely exonerate[s]" him, and nothing supporting his claim that the prosecutor's references to the tape "might have" been improper. Moreover, our review of the record indicates that the purpose for which the tape was admitted was collateral to a determination of defendant's guilt. Accordingly, defendant is not entitled to any relief on this basis.

Defendant's final argument is that the trial court abused its discretion in admitting his medical records because they contained hearsay. Again, we disagree. Claims of error relating to the admission

of evidence are reviewed for an abuse of discretion. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995). An abuse of discretion exists when the result is so violative of fact and logic that it evidences a perversity of will, a defiance of judgment or an exercise of passion or bias. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). This Court will not reverse on the basis of an evidentiary error unless the trial court's ruling affected a party's substantial rights. MRE 103(a).

The trial court did not abuse its discretion in admitting defendant's medical records under MRE 803(4). Defense counsel stipulated that the proposed records were, in fact, defendant's medical records provided by Detroit Receiving Hospital following this incident. On appeal, defendant merely asserts that there "might have" been hearsay statements in the records that could have prejudiced the jury against him. However, he does not indicate, nor did he indicate below, what statements are purported to be inadmissible hearsay or how those purported statements affected his rights. Moreover, the only references in the record regarding defendant's medical records indicate that he was shot, where he was shot, and that he had marijuana and cocaine in his system. These assertions all fit the test for admissibility of statements under MRE 803(4); the declarant must have the self-interested motivation to speak the truth to treating physicians in order to receive proper medical care, and the statement must be reasonably necessary to the diagnosis and treatment of the patient. *People v McElhaney*, 215 Mich App 269, 280; 545 NW2d 18 (1996). In addition, the statements are factual information to which defense counsel stipulated. There is no evidence of any other information in the records. Even if defendant's medical records contained inadmissible hearsay, we cannot conclude that a substantial right of defendant's was affected by the admission of these records.

We affirm.

/s/ Richard A. Bandstra
/s/ Donald E. Holbrook, Jr.
/s/ E. Thomas Fitzgerald